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In the

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,
Petitioner,
v.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE TAHOE-SIERRA PRESERVATION COUNCIL, INC. IN SUPPORT OF PETITIONER, BERNADINE SUITUM

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BRIEF AMICUS CURIAE OF THE TAHOE-SIERRA PRESERVATION COUNCIL, INC. IN SUPPORT OF PETITIONER, BERNADINE SUITUM

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae **Tahoe-Sierra Preservation Council, Inc.**, is a non-profit membership corporation organized under the laws of the State of California for the purpose of representing the interests of its approximately 2000 members, each a Lake Tahoe Basin property or business owner, before the applicable regional, state, and local regulatory agencies, including the Respondent Tahoe Regional Planning Agency ("TRPA"). The Tahoe-Sierra Preservation Council is also the lead plaintiff, along with approximately 450 of its members who are also individual named-plaintiffs, in twin lawsuits now consolidated and pending in the U.S. District Court, District of Nevada, before the Honorable Edward C. Reed (Case No. CV-N-84-257 ECR) involving "takings claims" brought against the Respondent TRPA. Those pending cases have been before the Ninth Circuit Court of Appeals on three separate occasions, and include:

- ***TSPC I*** – ***Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency***, 911 F.2d 1331 (9th Cir. 1990), cert. den. 499 U.S. 943 (1991)

- ***TSPC II*** – ***Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency***, 938 F.2d 153 (9th Cir. 1991)

- ***TSPC III -- Tahoe-Sierra Preservation Council, Inc., et al., v. Tahoe Regional Planning Agency***, 34 F.3d 753 (9th Cir. 1994), cert. den. __U.S.__, 115 S. Ct. 1401 (1995)

The issues at stake in the instant lawsuit are also issues involved in the aforementioned litigation brought by the Amicus Curiae and currently pending against TRPA in the U.S. District Court in Reno, and are otherwise issues of vital concern to all affected private property owners in the Lake Tahoe Basin who are subject to the regulatory requirements of TRPA.* Accordingly, Amicus Curiae has a strong and direct interest in the proper resolution of these important Constitutional issues, given the impact of the regulatory provisions adopted by TRPA upon the Preservation Council's members and other property owners owning property within the Lake Tahoe Basin. It was also for that reason that Amicus Curiae deemed it appropriate to submit, with this Court's consent, an earlier Amicus brief in support of the Petition for Writ of Certiorari in this matter.

Written consent to file this brief has been granted by both counsel for the Petitioner and the Respondent, and has been lodged with the Clerk of this Court.

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* Counsel of Record for the Amicus Curiae is also counsel for the defendants in a case now pending before the U.S. District Court, Eastern District of California, in which issues directly involving those addressed in the instant case are being raised as a defense by TRPA. See ***Tahoe Regional Planning Agency v. Romolo and Helen Barbieri***, E.D. of Calif., No. CVS-94-1380 LKK. All proceedings in that matter have been stayed by the District Judge pending this Court's decision in the instant case.

SUMMARY OF ARGUMENT

The Petitioner, Mrs. Bernadine Suitum, and her husband while he was alive, made what in hindsight was apparently a real blunder -- nearly 25 years ago they decided to purchase a small, vacant residential lot in a newly-developing residential subdivision in the North Lake Tahoe community of Incline Village, Nevada. Their intent was someday to build their dreamed-of retirement home on that lot. Then, in what now turns out to be another foolish mistake, they decided to sit tight and do nothing with their vacant lot for the next 15 years, while others built their homes on almost all of the neighboring lots in the subdivision, and while the surrounding area became extensively urbanized. Additionally, they also made the apparent mistake of selecting a lot that appeared to them to be easy to build upon -- virtually level, only a couple of pine trees (it had previously been logged), covered mostly with field grasses and willows, and bounded at the rear property line by a small man-altered watercourse -- a small stream known as Mill Creek which had been relocated into a newly-dug channel during the development of the subdivision.

Little did the Suitums know at the time they purchased their lot that a decade later the newly-reconstituted TRPA, motivated by a burst of environmental zeal and over the vigorous protests of hundreds of affected property owners, would declare such vacant homesite lots located near a watercourse to be environmentally sensitive Stream Environment Zones ("SEZs") because of their purported value in cleansing watercourses of the "nutrients" that were said by TRPA to contribute to the decline of Lake Tahoe's water ***clarity***. Thus, in the 1980s, based upon its newly-found environmental wisdom, TRPA simply imposed an outright ban on any further use or building on such vacant

SEZ residential lots including Mrs. Suitum's -- TRPA's presumably easily enforceable "fix" to the environmental problem it then perceived.

In doing so, TRPA totally disregarded the fact that Mrs. Suitum's lot is virtually the last remaining, privately-owned vacant lot in the now built-out and heavily urbanized area, nor did it do anything to address the fact that the watershed it purportedly was seeking to protect was already extensively altered, modified, and heavily disturbed by urbanization. Rather, TRPA placed the entire burden of "protecting" Lake Tahoe on those few property owners, including Mrs. Suitum, who had not yet built upon their homesites by simply banning outright any further construction on such vacant SEZ lots.

In ***Lucas v. South Carolina Coastal Council***, 505 U.S. 1003 (1992), this Court held that where a land use regulatory agency adopts a regulation prohibiting a private property owner from making ***all*** economically beneficial ***use*** of his or her private property in the name of the common good by banning any building or other structures on that property, a "categorical taking" has occurred triggering the Just Compensation requirements of the Fifth Amendment. The facts at issue in the instant case fit the *Lucas* categorical takings rule like a glove with one new twist.

To insulate itself from a "takings challenge", the Respondent TRPA -- more particularly its highly-capable Self-Defense Experts -- simply appended to TRPA's SEZ building prohibition a post-takings "Transferable Development Rights" ("TDR") scheme by which Mrs. Suitum could theoretically recoup a small portion of the lost ***value*** of her valuable property by supposedly selling to another private party certain so-called "transferable rights" bestowed on her by TRPA after it prohibited all use of her property. When challenged in federal court, TRPA's Self-Defense Experts then, as expected, asserted that Mrs. Suitum

first had to navigate through TRPA's labyrinthian new TDR maze to try to determine whether in fact she could find anyone who was willing to pay her some amount of money for the redeemable TDR chits. They contended that until she did so, Mrs. Suitum takings claim was not "ripe" for judicial review.

Unfortunately, both the District Court and the Ninth Circuit fell for this ploy. Muddling the concept of potential post-takings ***recoupment of partial lost value*** with the ***denial of all use*** upon the adoption by TRPA of its SEZ building prohibition, the lower courts effectively created a gaping new hole in the *Lucas* categorical takings rule by requiring Mrs. Suitum to fully exhaust this agency-created, highly-speculative, post-takings TDR scheme before her takings claim was deemed judicially "ripe" -- a seemingly insurmountable new barrier effectively barring the courthouse doors to Mrs. Suitum.

On closer examination, it is clear that TRPA's Self-Defense TDR gimmick has nothing whatsoever to do with any ***use*** that Mrs. Suitum could make of her own property, nor with any rights granted to her to transfer any potential ***use*** to another property she owns, as she owns no other property in the area. At best, TRPA's TDR scheme simply provides her with a "redeemable voucher" that may or may not allow her to recoup some meager post-takings ***dollars*** to try to ameliorate her loss. Thus, seen in its best light, it goes only to the issue of the Just Compensation to which Mrs. Suitum is entitled -- a factual determination for the trier of fact when the matter of Just Compensation is addressed at trial, not an issue that can be properly resolved by way of summary judgment nor one having anything to do with the "ripeness" of her takings claim.

ARGUMENT

I

NO MORE GRAPHIC EXAMPLE OF THE NEED TO INVOKE THE PROTECTIONS OF THE FIFTH AMENDMENT CAN BE IMAGINED THAN THE DECISION OF TRPA TO REQUIRE MRS. SUITUM TO SACRIFICE *ALL USE* OF HER RESIDENTIAL PARCEL IN THE NAME OF PROTECTION OF LAKE TAHOE, VIRTUALLY THE LAST REMAINING VACANT HOMESITE PARCEL IN A NEARLY BUILT-OUT AND HEAVILY URBANIZED AREA.

A. The Regulatory Background:

There can hardly be any question about it -- TRPA certainly has earned the much-coveted Blackbelt for its demonstrated expertise in the specialized regulatory art of Takings Self-Defense. A recognized pacesetter whose bold and seemingly no-holds-barred approach has earned it the acclaim of its bureaucratic brethren, TRPA is today nearly without equals in its efforts to immunize its seemingly confiscatory land use regulations from the usual judicial scrutiny afforded to such measures.

One need hardly look any further than the facts and circumstances of this case for a more graphic example of how the extraordinary regulatory zeal of a land use regulatory agency has apparently blinded it to its equally important obligation to treat those it regulates in a Constitutionally permissible and fair manner.

The saga began in the early 1980s when the newly-reconstituted TRPA, concerned about scientific reports

showing a decline in the water *clarity* of Lake Tahoe,[1] determined that that decline was due in significant part to man-caused soil disturbance in scores of recently-urbanized sub-watersheds that surround Lake Tahoe . . . disturbances such as highways, road cuts and fills, large commercial and public projects, new subdivisions, and similar construction activities that TRPA concluded were "releasing nutrients" in the watersheds (nitrogen and phosphorus in the soils), which in turn are carried down to the Lake by seasonal run-off through the numerous watercourses feeding Lake Tahoe. Those additional soil nutrients, TRPA said, provide extra nourishment for the microscopic free-floating algae naturally found in the Lake, thus causing more microscopic algae growth which in turn reduces the clarity of the Lake's waters.

Thus, beginning in the early 1980s and continuing to the present, TRPA, over the vigorous protests of thousands of impacted private property owners who purchased legally-created homesites in existing residential subdivisions on which someday to build their retirement or vacation home, adopted an increasingly more Byzantine set of regulatory requirements that were purportedly aimed at trying to address the issue of the apparent increase in nutrients reaching Lake Tahoe.

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[1] The issue, unfortunately, is frequently mischaracterized as a "water quality" issue suggestive of a health and safety concern, when that of course is not the case. The waters in Lake Tahoe continue to be extraordinarily clean, clear and pristine -- cleaner and safer than almost all domestic drinking water anywhere in the country. The real issue is visual ***clarity*** -- how deep the human eye can see into the waters of the Lake as measured by the depth at which a 9-inch white disk lowered from a boat near the center of the Lake is seen to disappear from sight.

Pursuant to TRPA's 1987 Regional Plan at issue here, the key components of its adopted regulatory approach were to limit the number of newly-constructed homes in the Lake Tahoe Basin to 300 per year out of literally thousands of eligible vacant parcels; to ban all new lot-and-block residential subdivisions; to require compliance with strict building requirements known as "Best Management Practices" in the construction of the homes it allowed to be built so as to avoid erosion runoff; and to evaluate, score, and rank all existing vacant single-family parcels in the Basin through a highly-complex new Individual Parcel Evaluation System ("IPES"), with those receiving the lower scores being virtually precluded from ever building. As to certain lots or parcels found to be in areas TRPA euphemistically labelled as "Stream Environment Zones" -- now commonly referred to as "SEZs" -- it earmarked those properties as the most "environmentally sensitive" requiring the most "heightened protection" . . . regulatoryeze for justifying a blanket ban on any further "soils disturbance" -- building -- on those SEZ lots, including the lot owned by Mrs. Suitum.

Thus, with the magic stroke of its regulatory pen, TRPA not only coined the lofty-sounding label "Stream Environment Zone", but proceeded to define that term extremely broadly to encompass the watercourse itself and the adjacent banks and floodplain, as well as all of the nearby lands that showed any indication of subsurface wetness or high groundwater evidenced by the nature of the vegetation and soils.[2] That SEZ concept in turn became a

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[2] The precise definition of "SEZs" is set forth in TRPA's Code of Ordinances at Chapters 2 and 37.3, and is too lengthy and complex to set forth here in full. It involves a number of technical indicators by which the outer boundaries of a SEZ are determined and then mapped. Once mapped, TRPA's 1987 Regional Plan, at Goal 1, Policy 5.A. of the Conservation Element, and Ordinance Section 20.4,

central building block of TRPA's aggressive new regulatory program.

Having decided to ban all new development in areas it designated as SEZs TRPA next proceeded to map and field-verify the boundaries of thousands of acres of SEZs throughout the literally dozens of sub-watersheds that comprise the Lake Tahoe Basin, and then to overlay the current parcel ownership maps to identify those parcels of lands that were reportedly within SEZs.

Having "mapped" those SEZs, and having overlayed the property ownership boundaries, TRPA imposed a series of broad-sweeping regulatory restrictions that, cutting to the chase, prohibit outright all new land coverage[3], permanent land disturbance, or any other development within such mapped SEZs, particularly on privately-owned, vacant residential lots lying within SEZs such as that owned by Mrs. Suitum, with only very limited exceptions applicable to public outdoor recreation projects and certain other public facilities.

As applied to Mrs. Suitum's property, one of literally hundreds of similarly-situated SEZ vacant homesites, TRPA, at page 2 of its Brief in Opposition to the Petition for Writ of Certiorari, summarized its decision-making process and the consequences thereof as follows:

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expressly prohibit "any new land coverage or permanent land disturbance" in a SEZ area.

[3] "Land Coverage" is defined in Chapter 2 of TRPA's Code of Ordinances as a "man-made structure, improvement, or covering that prevents normal precipitation from directly reaching the surface of the land", such as buildings, decks, driveways, sidewalks, patios, and similar hard surfaces.

Mrs. Suitum's property is classified by TRPA as being located within a Stream Environment Zone [SEZ], which is a classification established by TRPA based upon the environmental sensitivity of the parcel. An (sic) SEZ generally conveys surface water from upland areas into Lake Tahoe and its tributaries. The role of an (sic) SEZ in the cleansing of run-off is integral to the preservation of Lake Tahoe's water clarity. Lake Tahoe is universally acclaimed as a national treasure. The riparian vegetation of an (sic) SEZ is important for many reasons, including treatment of runoff and maintenance of soil stability.

> **The classification of Mrs. Suitum's parcel as an (sic) SEZ prohibits construction of a new single family dwelling thereon.** [Citations omitted; emphasis added.]

To the regulators at TRPA, it was simple and straightforward. SEZs are "environmentally sensitive" areas that help cleanse run-off, thus helping preserve the water clarity of Lake Tahoe, a "national treasure". Mrs. Suitum's lot was found to be within such a SEZ. Thus she must be made subject to regulations that "prohibit construction of a new single family dwelling thereon," or for that matter, any other *use* whatsoever of her vacant lot.

And apparently to underscore how strictly it intended this SEZ prohibition to be applied, the TRPA-adopted regulatory program left no discretion to the TRPA staff regulators on individual project applications, nor did it provide literally hundreds of affected private property owners, including Mrs. Suitum, with any meaningful options. They were simply prohibited by TRPA from using their property for any viable purpose, once it was found to fall

within a TRPA-mapped SEZ. Conspicuously absent was any variance procedure to allow individual property owners to demonstrate that given the special circumstances of their property, or its location or unique configuration, it was virtually impossible for any construction on their lot to cause "soil nutrients" to enter Lake Tahoe. Nor did the regulations allow a property owner to demonstrate how and in what manner they could safely build so as to meet strict standards intended to prevent erosion, nutrient run-off, or other adverse impacts to the Lake. There simply were and are no exceptions.

B. Mrs. Suitum's Vacant Homesite & The Surrounding Urbanized Area

Perhaps best illustrating the ill-conceived consequences of TRPA's blinders-on approach are the circumstances of Mrs. Suitum's case -- facts that are a matter of public record and will undoubtedly be put forward to the trier of fact if and when Mrs. Suitum is allowed "to have her day in court".

The single-family, vacant homesite purchased by Mr. & Mrs. Suitum nearly 25 years ago as the site of their dream-of retirement home is a level lot slightly less than 1/2 acre in size (approximately 18,300 square feet), located in the now built-out Mill Creek Subdivision located in a heavily urbanized portion of the community known as Incline Village, Nevada.[4] That residential subdivision was first developed in the early 1960s pursuant to a Final Subdivision Map and all other required approvals granted by the County

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[4] Mrs. Suitum's parcel is identified in the Official Records of Washoe County, Nevada, as Lot 15, Block K, Mill Creek Subdivision, Assessor Parcel No. 130-211-31, and would have a street address of 159 Mayhew Circle, Incline Village, if a home were to be built upon it.

of Washoe, State of Nevada, in accordance with the then applicable regulatory requirements. The subdivision and all of the separate residential lots are served by paved streets, underground sewers, water, electricity, telephone, and the other amenities of a residential community.

A quick drive through the area quickly shows that Mrs. Suitum's lot is one of only a handful of remaining privately-owned vacant lots out of scores of residential homesites in her subdivision, virtually all of which now have homes constructed on them. In fact, along the approximately 1/4 mile length of the residential street known as Mayhew Circle on which Mrs. Suitum's parcel is located, there are 18 individual homes on both sides of the street, many dating back more than 25 years, and most owned by so-called second homeowners as vacation residences.

Mrs. Suitum's lot, which faces the paved Mayhew Circle road, has homes constructed on each side of her lot, as well as homes constructed on all of the lots to the rear of her lot. Her lot is the only remaining privately-owned vacant lot on her street, although there are also a handful of vacant lots owned by public agencies. It is also virtually the last privately-owned vacant lot in the entire subdivision. It takes an extraordinary mental stretch to conceive how building a home on her lot could possibly have any measurable impact on Lake Tahoe. Nevertheless, it certainly appears Mrs. Suitum is now being required to bear nearly the entire burden for the alleged excesses of development that have already occurred in her subdivision and the surrounding watershed by sacrificing any further use of her lot in the name of the common good.

As to the surrounding watershed, if and when Mrs. Suitum is allowed her day in court, it will become readily apparent to the trier fact that the so-called precious SEZ known as Mill Creek is hardly the type of pristine mountain stream that that term conjures in one's mind. Even a cursory

inspection shows that it is nothing more than a short, heavily-altered watercourse which has been piped, culverted, channeled, moved, and otherwise extensively impacted by the activities of man over the last several decades.

For example, less than a 1/2 mile upstream from Mrs. Suitum's property, the waters from the surrounding mountainside are captured in a reservoir behind an earthen dam known as Mill Creek Dam No. 2. The public record shows that that dam and reservoir were built in 1962 as an emergency waste water storage facility to be used for emergency overflow from the Community Sewer Treatment Plant that is located adjacent to the reservoir. In fact on one occasion in the past the reservoir was used for just such emergency overflow of chlorinated waste water according to the records of the Incline Village General Improvement District which operates the facility.[5]

Waters trapped behind the Mill Creek Dam No. 2 are then released on a controlled basis to run down through a much-altered watercourse still known as "Mill Creek" through a heavily urbanized light industrial area, including the community trash-recycling center which is immediately adjacent to the watercourse. The watercourse then crosses underneath State Highway 28 through a large culvert, and works it way down through the Mill Creek Subdivision and behind Mrs. Suitum's lot through a relocated, man-dug channel which was placed along the back property line of Mrs. Suitum and her neighbors' properties at the time the subdivision was developed to relocate the original meandering stream course. Just a short ways downstream, the watercourse is again culverted where it crosses under still

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[5] See the recent public report entitled "The Legacy of Mill Creek Dam #2" prepared by Daniel M. St. Johns, P.E., and currently the Director of Engineering for the Incline Village General Improvement District.

another major roadway (Lakeshore Blvd.), and then continues until it discharges into Lake Tahoe approximately 1/2 mile downstream from Mrs. Suitum's lot. Also, just a couple of blocks from Mrs. Suitum's lot is one of the Tahoe Basin's largest tourist attractions, the well-known Ponderosa Ranch Amusement Park, that has created enormous disturbance to acres of mountainside that also drain and run-off into the same Mill Creek drainage.

To help the Court better understand the factual setting involved, we have taken the liberty to append to this brief as Appendices the following: Append. A -- 1992 Aerial Photo of Mill Creek Drainage; Append. B -- Copy of "TRPA-Mapped SEZ -- Mill Creek Drainage" showing the TRPA-mapped SEZ boundaries, Mrs. Suitum's lot, and existing residences; and Append. C -- "Portion of Recorded Plat Map -- Mill Creek Subdivision" recorded in 1960 showing the Mayhew Circle portion of the subdivision, and depicting whether the individual lots currently have homes constructed upon them or remain vacant.

Unfortunately for Mrs. Suitum, she has several strikes against her. First, when her husband was still alive, the Suitums made what now appears to be the foolish decision to sit still while their neighbors were building their homes, rather then sprinting off to get their own home into the ground. Secondly, they made the apparent mistake of purchasing a homesite that had a small, relocated creek running along the rear boundary line of the lot. Because of the proximity to that creek, Mrs. Suitum's virtually flat and easily buildable lot, which has only a few second-growth pine trees, is primarily vegetated today with what TRPA now labels as "riparian vegetation" -- willows and field grasses -- that are deemed by TRPA to be prime indicators of a SEZ, and thus deserve "heightened protection". Apparently, TRPA views the root systems of those willows and field grasses as being crucial to its strategy of ensuring that the SEZ continues to function as a nutrient uptake area. Hence

TRPA's total prohibition on any soil disturbance -- even a shovelful -- on Mrs. Suitum's lot, so as not to further disturb what TRPA apparently believes is such a critically-important root system that it requires permanent protection.

C. TRPA's Broadbrush Regulatory Prohibitions and Its Creative Defenses

TRPA's broadbrush regulatory restrictions are virtually blind to what is on the ground, nor do they even attempt to address the abuses of yesteryear. Rather, TRPA takes the simplistic and presumably more easily enforceable approach of simply barring Mrs. Suitum, and any other private property owners who may still own *vacant* land within mapped SEZs, from making any new use or disturbance on their vacant land. No, TRPA did not say that Mrs. Suitum could build a home like her neighbors if she could show how she would do so and also prevent any erosion or soil nutrients from reaching the Mill Creek drainage, which in her case would be quite easy to do with an appropriate rear-yard berm or wall, given the level nature of her lot and the long distance between the rear of her building site and the watercourse. Nor did TRPA allow her to build a home if she would revegetate with high nutrient-uptake vegetation the areas along the banks of the watercourse and on the rear portion of her lot, which in her case would also be relatively easy to do as it is essentially just an open grass areas. Nor did TRPA say she would be allowed to build if she would provide her fair share of mitigation elsewhere in the watershed to help correct some of the abuses that had already occurred in the watershed and along the watercourse. Rather, TRPA simply said **NO** -- because we have determined that your lot is properly classified as being within a SEZ, we have concluded that it is simply too valuable to the protection of Lake Tahoe to be used for your homesite, and it must therefore remain vacant into perpetuity.

Having intentionally chosen to draw the line in the sand, TRPA then decided to hunker down and to defend the righteousness of its decision to the bitter end. Thus, instead of turning its energies to raising the necessary dollars from its two Sister States, who historically have shown a strong commitment to help fund environmental programs at Lake Tahoe,[6] and to purchase the remaining undeveloped lots in the Mill Creek drainage at true fair market value, TRPA chose to pass the baton to its talented and certainly tenacious Blackbelt self-defenders.

TRPA's first line of defense was a rather ingenious but circular argument that because the Legislatures of the States of California and Nevada, in creating the bi-state Tahoe Regional Planning Compact, had not acted to convey upon TRPA the power of *direct* condemnation -- nor to give TRPA a budget to acquire environmentally sensitive lands -- that *a fortiori* TRPA could not be sued or liable in *inverse* condemnation. Somewhat inexplicably, but most likely because it wore the proverbial white hat, early on the sympathetic local Federal District Court and as well as at least one panel of the Ninth Circuit found compelling logic in this argument. Thus, without citation to any other authority or much analysis, the Ninth Circuit concluded in ***Jacobson v. Tahoe Regional Planning Agency***, 566 F.2d. 1353, 1358 at n. 7 (9th Cir. 1977), "TRPA was given only the power to regulate, not the power to condemn", and

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[6] For example, at the November 5, 1996 elections, the voters of California approved another Water Quality Bond Measure (Proposition 204) that will make an additional $10,000,000 available on the California-side of Lake Tahoe for acquisition of "sensitive lands" and water quality improvements; and the voters of Nevada approved Measure 12, a $20,000,000 bond proposition for water quality improvements applicable to the Nevada-side of the Basin.

therefore could not be liable in damages for inverse condemnation.

That first line of defense held the tide back for nearly 13 years until it was successfully breached in a lawsuit pursued by Amicus Curiae on behalf of several hundred similarly-situated Tahoe property owners. Thus, in 1990, the Ninth Circuit was finally persuaded, following this Court's decision in ***First English Evangelical Lutheran Church v. County of Los Angeles***, 482 U.S. 304 (1987), to revisit its earlier ruling in ***Jacobson***. In ***Tahoe-Sierra Preservation Council, Inc., v. TRPA***, 911 F.2d. 1331 (9th Cir. 1990) [***TSPC I***], the Ninth Circuit was compelled to conclude the ***Jacobson*** reasoning "is at odds" with ***First English*** -- ". . . even a temporary regulation may result in a substantial burden to landowners, and '[w]here this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land . . .'" *Id.* at 1341.

But not undaunted, TRPA's self-defense experts returned to their arsenal, this time pulling out a new array of "ripeness and mootness" weapons . . . new mines in the minefield they placed across the access route to the courthouse. Again, one by one, those new mines were also defused in the litigation brought by other property owners, including the Amicus Curiae. See the host of ripeness and mootness defenses raised by TRPA in ***TSPC I, TSPC II,*** and ***TSPC III, supra***, addressed at length by the Ninth Circuit in those cases.

That effectively left TRPA with its last remaining rear-guard defense -- the cleverly-labelled "Transfer of Development Rights" gimmick crafted by its team of self-defense experts. We need not belabor here the myriad of details involved in those TDR measures, as those details have

been thoroughly briefed and discussed by the parties in their briefs.

Rather, stated simply, what TRPA intended to do in that artfully-crafted maze of TDR ordinances was to set up the very argument it subsequently made with success to the lower courts in the instant case, an argument that runs as follows: "Your Honor, we did not take all of Mrs. Suitum's property . . . in fact, we have given her new "uses" . . . the right to receive from us special TDR chits that she can redeem in the new TDR marketplace we have also created by our regulations. All she needs to do is to take one or more of those chits into that marketplace and find a private property owner who owns property elsewhere in the Tahoe Basin whom we have also regulated, but who is now motivated to pay Mrs. Suitum some money for one of those chits . . . so that that other property owner can now build a slightly bigger home using slightly more coverage than would otherwise be allowed. In fact, we will then allow Mrs. Suitum to sell that property owner up to 183 square feet of coverage (13.5 sq. ft. x 13.5 sq. ft.) off her SEZ lot to that buyer at the going marketrate, which we understand is from $5 to $8 per sq. foot. No, we do not know who that other buyer will be, but we are sure there must be someone out there if only Mrs. Suitum would try . . . because we know our regulations are so tough and we limited others so severely that they will be chafing at the bit to purchase the TDR chit from Mrs. Suitum. No, we really do not know exactly how much they will offer to pay, nor do we really care . . . because what is really important is that Mrs. Suitum can probably receive some dollars for the land coverage we will allow her to transfer, and if so, then it is clear that she has some "use" left in her SEZ lot that would defeat her takings claim. Certainly she should not be allowed to clog up the courts until she has fully exhausted every attempt to avail of herself of these special TDR rights, nor is her case "ripe" until she has done so."

The sad fact is that this last-ditch defense worked -- at least before the District Court and the Ninth Circuit. Now more than nine years after TRPA prohibited all further use or construction on her lot, Mrs. Suitum is but another victim of TRPA's no-holds-barred war of attrition . . . still fighting her well-funded public agency adversaries to try to have her day in court.[7]

II

THE NINTH CIRCUIT'S APPROACH IN THIS CASE, IF ALLOWED TO STAND, CARVES A GAPING HOLE INTO THE "CATEGORICAL TAKINGS RULE" CAREFULLY CONSIDERED AND ARTICULATED BY THIS COURT IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL.*

Four years ago, this Court determined under facts remarkably similar to the facts of the instant case that a property owner who has been denied ***all*** economically beneficial ***use*** of his or her vacant single-family residential property as a result of the adoption or application of a governmental land-use regulatory enactment has suffered a "categorical taking" invoking the protection of the Fifth

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[7] As the long, litigious battle underscored by the three Ninth Circuit opinions in ***TSPC I, TSPC II*** and ***TSPC III*** makes crystal clear, TRPA is no neophyte when it comes to waging wars of attrition. At least five times the district courts have ruled in favor of TRPA in that ***TSPC*** litigation, only to be reversed on significant issues three times by the Ninth Circuit, not to mention TRPA's most recent unsuccessful Writ of Certiorari to this Court. Those consolidated cases are now in their 12th year of litigation, and are back in the District Court where a stay has been granted pending lengthy mediated settlement efforts currently in progress.

Amendment. Thus, in ***Lucas v. South Carolina Coastal Council***, *supra*, this Court attempted to set this long-lingering issue to rest when it held:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. *Id.* at 1019. [emphasis in original]

In ***Lucas***, this Court carved out only one narrow exception to the "categorical rule" it enunciated, an exception which is not relevant here -- i.e., where the regulation deprives the landowner of all economically beneficial use of his or her land, the State "may resist compensation only if . . . [it] shows that the proscribed use interests were not part of his title to begin with." ***Lucas***, 505 U.S. at 1027.

Nowhere in ***Lucas*** did the Court suggest or even hint that there may be still another gaping hole in the protections afforded by the Fifth Amendment, such as that now suddenly fashioned by TRPA's creative self-defense experts and sold to the District Court and the Ninth Circuit in the case of the Petitioner.[8] That new "exception" if allowed to stand will most likely quickly be latched onto by numerous other land use regulators, at least throughout the Ninth Circuit, as a way to help protect them from suit, thus threatening to again submerge the well-articulated substantive rule in ***Lucas*** into a new procedural quagmire.

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[8] Inexplicably, in spite of the clear import of this Court's decision in ***Lucas***, the Ninth Circuit in its Opinion in the instant case made no mention of nor reference to ***Lucas***, nor did it offer any explanation whatsoever as to why it did not consider ***Lucas*** to be relevant to its analysis.

Pursuant to this newly-created "ripeness exception" to the ***Lucas*** categorical takings rule, all the regulatory agency apparently has to do when it adopts a land use regulation prohibiting ***all*** economically beneficial ***use*** of a person's private property in the name of the common good is to be sure to include a provision granting that property owner some form of post-takings "transferable rights" -- purported new "rights" the property owner may or may not be able to sell at some unknown point in the future to some unknown buyer, and for some unknown amount of dollars, in a secondary TDR marketplace created by the agency resulting from the placement of an artificial limit on the availability of those "rights" to other regulated property owners. Thus, by the magic stroke of the regulator's pen, the agency is again able to insulate itself from a takings challenge, at least until the property owner whose land has been prohibited from use first demonstrates that he or she has attempted to fully navigate this new TDR maze by showing how or in what manner the purported TDR "rights" did or did not ultimately provide that owner with any modicum of post-takings compensation. The result is to place an enormous if not impossible new burden on the property owner -- in this case Mrs. Suitum -- thus effectively blunting the clear dictates of the ***Lucas*** categorical takings rule.

The reality is that the cleverly-crafted TDR gimmick fashioned by TRPA as part of its regulatory scheme has nothing at all to do with Mrs. Suitum's ***use*** of her property, but in fact is merely a transparent attempt to allow her the possibility of recouping some very limited post-takings ***dollars*** in a highly speculative secondary private marketplace created by TRPA as part of its self-defense efforts.[9]

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[9] To hammer the last nail into the proverbial coffin, TRPA also ordained that even if Mrs. Suitum decided to exercise her precious new "right" to sell one or more of the TDR chits it had belatedly bestowed upon her, she must first

Unfortunately, both the District Court and the Ninth Circuit fell for this gimmick lock, stock and barrel just as TRPA's self-defense experts had intended -- concluding that in fact the TDRs purportedly made available to Mrs. Suitum created a potential new ***use*** of her property that must first be fully exhausted and evaluated as part of the "takings calculus" before she could file and pursue her takings claim in federal court. See Ninth Circuit's conclusion that the "transfer of development rights is a 'use' of SEZ property" -- Appendix A-9 to Petition for Writ of Certiorari. But the unvarnished truth is this TDR gimmick -- no matter how high-sounding its label -- has nothing whatsoever to do with the ***uses*** available to Mrs. Suitum on her own property or any other property she owns to which they can be transferred, but only with the highly speculative recoupment at some later time of a few ***dollars*** for the loss she has already suffered.

Lucas leaves no question that the proscription of the Fifth Amendment that "private property shall [not] be taken for public ***use***, without just compensation" means exactly what it says. As was repeatedly underscored by this Court in ***Lucas***, the central focus is necessarily on the ***uses*** that

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agree to record a "Deed Restriction" which "permanently retired" her lot -- that is, requiring her "voluntarily" to agree to permanently greenbelt her lot in order to exercise her "privilege" to recoup some meager portion of her lost value by selling one of the TDR rights, assuming she could even find a buyer. And, to add further insult to injury, the Ninth Circuit found that Mrs. Suitum had no ability to seek redress in the courts unless and until she first attempted to sell one of those TDR rights, and if somehow she were successful in finding a buyer, first "Deed Restricting" her property, at which point her case would finally "ripen" sufficiently for federal court review.

have been circumscribed by the governmental regulation at issue, that is the ***uses*** which remain after the regulation has become effective, not the amount of devaluation of the property due to the regulations. Time and again, this Court in ***Lucas*** stressed this primary focus as to the ***uses*** which remained after the regulation's adoption. See, for instance, the discussion in the majority opinion in ***Lucas*** at 1015: "The second situation in which we have found categorical treatment appropriate is where regulation denies all ***economically beneficial or productive use*** of land"; and at 1015, citing ***Agins v. Tiburon***, 447 U.S. 255 at 260, ". . . the Fifth Amendment is violated when regulation . . . denies an owner ***economically viable use*** of his land"; and at 1016, citing ***Keystone v. Bituminous Coal v. DeBenedictis***, 480 U.S. 470 at 495: "A statute regulating the ***uses*** that can be made of property effects a taking if it 'denies an owner ***economically viable use*** of his land'"; and at 1016, fnt. 7: ". . . the force of our 'deprivation of ***all economically feasible use***' rule is greater than its precision . . ."; and at 1019: ". . . when the owner of real property has been called upon to sacrifice ***all economically beneficial uses*** in the name of the common good, that is to have his property economically idle, he has suffered a taking."

In the case of Mrs. Suitum -- as was the case with Mr. Lucas's beachfront property in South Carolina -- there is simply no dispute that the regulations adopted in the name of environmental protection did in fact deny her ***all use*** of her vacant, single-family residential parcel located in a nearly built-out, residential neighborhood. Thus, effective upon the date of TRPA's adoption of the SEZ regulations and their application to her property, Mrs. Suitum's private property became entirely ***useless***[10]. In a nearly identical manner, the

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[10] While Mrs. Suitum did "appeal" the correctness of TRPA's SEZ designation of her lot, that appears to have been both an unnecessary and futile act. TRPA's regulations

South Carolina Beachfront Management Act, as it was implemented by South Carolina's Coastal Council, also placed Mr. Lucas's single-family residential lots in a "coastal protected area", as to which all new "occupiable improvements was flatly prohibited." ***Lucas***, 505 U.S. at 1009.[11]

In any event, it cannot and has not been disputed that the clear effect of TRPA's regulatory enactments at issue was to prohibit the construction of a home on Mrs. Suitum's single-family homesite, the only remaining viable ***use*** that would otherwise be consistent with the underlying zoning and "allowed uses" in the surrounding residential neighborhood, all in the name of "environmental protection" for the common good. Following ***Lucas***, that should have been the end of the inquiry, but regrettably that is not the case.

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and mapped SEZ designation of Mrs. Suitum's lot were hardly likely to be modified by the same agency that had already field-verified and mapped the SEZ boundaries. That supposed appeal process was really nothing more than another round in the war of attrition. In fact, the taking of Mrs. Suitum's lot became operative the day the SEZ prohibitions went into effect -- a takings that was clear on the face of the regulations.

[11] Interestingly, in ***Lucas*** the regulations there at issue would have allowed Mr. Lucas to actually construct certain small walkways and decks on his beachfront parcel having a total area of not more than 144 square feet, which even this Court found hardly was a viable "use" sufficient to defeat his takings claim. See ***Lucas***, 505 U.S. at 1009, ftnt. 2. In contrast, the TRPA regulations at issue did not allow Mrs. Suitum to make even that minimal "use" of her property by constructing a similar small structure on her property.

III

IF ANYTHING, THE TDRs AT ISSUE GO TO THE MATTER OF "JUST COMPENSATION", AND HAVE NOTHING WHATSOEVER TO DO WITH THE "RIPENESS" OF MRS. SUITUM'S TAKINGS CLAIM.

How should the so-called TDRs purportedly made available by TRPA to Mrs. Suitum, and for that matter to other similarly-situated lot owners whose properties were also found by TRPA to be too "environmentally sensitive" to be built upon, be correctly viewed in terms of the takings calculus? The answer to that query, at least in the instant case, seems clear.

Where, as here, those TDRs are at best intended to provide some potential, albeit small, post-takings ***dollar*** recovery to the property owner, not the actual transfer of ***use*** rights by that property owner from one property to another owned by that same property owner, then it would appear those TDRs should only have relevance, if any, to the Just Compensation component of the determination. Under no circumstance, however, should they have any bearing on the issue of the "ripeness" of the property owner's takings case for judicial review. Let us amplify.

This Court has addressed the interplay of TDRs in the takings calculus in only one other case -- ***Penn Central Transportation Co. v. New York City,*** 438 U.S. 104 (1978). In ***Penn Central***, of course, the facts were entirely different, and the TDRs at issue there were shown to be of potentially valuable ***uses*** -- e.g., restricted commercial floor area in downtown New York City. While Penn Central was told by the City of New York that in order to preserve the historic landmark Grand Central Terminal it would not be allowed to build a proposed 55-story office tower immediately above the Terminal, nevertheless under the City's Landmarks Preservation Law, Penn Central was given a special

offsetting right to transfer that same commercial floor area to one or more of at least eight other existing office or commercial buildings owned by Penn Central in the immediate vicinity, thus allowing for the expansion of one or more of those buildings by up to 20% more in floor area than would have otherwise been allowed.

Of course, importantly in the case of Penn Central, it already had a long and valuable existing "use" of its Terminal site. What was being prohibited ("taken") was the potential enlargement of that Terminal into the air space owned by Penn Central above the structure, with the proviso that the property owner could achieve essentially the same total expanded commercial floor area through the enlargement of the nearby commercial buildings it also owned.

In stark contrast to ***Penn Central*** are the facts of Mrs. Suitum's case:

- She is allowed to make no use whatsoever of her own residential property, nor does she seek to enlarge a structure already on that property.

- Unlike Penn Central, Mrs. Suitum has no other property in the vicinity to which she can transfer anything . . . nor is her parcel large enough so that she can move her proposed home from a preferred but environmentally sensitive area to a less desirable building site (transfer her building rights within her same parcel).

- Unlike the obviously valuable commercial floor area Penn Central was being permitted to transfer in exchange for the new restrictions on expansion of the Terminal, Mrs. Suitum is at best merely given the speculative chance under TRPA's chimerical TDR provisions to possibly sell to some

unknown buyer and for some unknown amount a "TDR chit" for cash -- in effect, a redeemable voucher that may or may not have any value, and may or may not be able to be sold in the secondary marketplace created by TRPA.

- And, of course, unlike Penn Central, Mrs. Suitum is also being required to permanently greenbelt her parcel if she avails herself of the TDR option, even though she presumably would still be burdened with all the responsibilities of private ownership, e.g., the payment of taxes and assessments, trash and debris removal, liability risks, and the like.

At best, all TRPA offered to Mrs. Suitum is a "redeemable voucher" -- not even one she can take to her own local government or to TRPA and turn in for compensation. Rather, according to TRPA, somehow through a mystical and yet-to-be-explained process Mrs. Suitum must try to locate a buyer in TRPA's-created secondary marketplace who is willing at some yet-to-be-established price to purchase that redeemable voucher, and then turn it back into TRPA in exchange for something said to be of value -- e.g., 183 square feet of land coverage which TRPA would then hand out, or something called a "development right" purportedly needed only by someone who wants to build a small multi-family structure. It sounds remarkably similar to scrip money paid out when a governmental treasury is barren, on the promise that maybe someday the holder will be able to redeem that scrip money for at least some cents on the dollar.

For TRPA to now suggest that its own TDR program should be analyzed in the same manner as that in ***Penn Central***, and to contend that its own program provides a bona fide "transferable use" that may "negate a takings claim" in reliance on this Court's analysis in ***Penn Central***,

at best strains all credulity. (See TRPA's assertion in its Brief in Opposition to Certiorari, at p. 10.) To then take the next giant leap of faith and contend that based on this Court's decisions in ***Penn Central*** and ***Williamson County***, the burden of first "exhausting" TRPA's labyrinthian TDR maze should be placed upon Mrs. Suitum before her case is "ripe" enough for her to be allowed to have her day in court, goes far beyond what any court in the land has ever held is required before a beleaguered property owner can seek judicial protection of their important Constitutional rights.

Lucas teaches that where as here a public agency has already adopted a regulation which on its face denies ***all*** further ***use*** of private property, and where it seeks to defend that regulation by demonstrating that the proscribed use was in fact prohibited by long-established common law nuisance principles, the burden of making that showing shifts to the public agency. As the Court said in ***Lucas***, it was not Mr. Lucas, but the State of South Carolina which must make that showing should it attempt to defeat Mr. Lucas's otherwise total takings claim. ***Lucas***, 505 U.S. at 1031. That, of course, puts the burden where it properly belongs . . . on the public agency that enacted the regulatory measure which denies all viable use of an individual's private property.

There is no compelling reason not to employ the same approach here, and place the burden where it properly belongs -- on TRPA. If that burden is placed where it belongs, then TRPA can also have its day in Court. Thus, at the time when the judge or jury is determining the amount of Just Compensation to be awarded, TRPA would have the option of showing, if it can, that its TDR program has already given Mrs. Suitum something of intrinsic value equivalent to Just Compensation, and therefore she should be deemed to have received at least the amount of Just Compensation shown to be equal to the TDR's value as a credit against any Just Compensation to be awarded. While it seems unlikely that TRPA will ever be able to carry that

burden, at least by placing the burden on TRPA it falls where it belongs -- upon the agency which created the extraordinary complex TDR scheme to show how it really works in practice.[12]

But to reiterate, the post-taking sale of the Transferrable Development Rights fashioned by TRPA, even if consummated, is in fact nothing more than the sale of a chit of paper -- a redeemable voucher -- that results at best in the recoupment by Mrs. Suitum of a few meager ***dollars***, and has nothing whatsoever to do with the ***uses*** to which Mrs. Suitum can now put her own property. Nevertheless, in muddling the concept of ***uses*** with the concept of ***value***,[13] the Ninth Circuit found that even if Mrs. Suitum could theoretically recoup a small part of her lost ***value*** by the sale of a TDR, that would defeat her takings claim, since "regulatory ordinances that merely diminish the value of property [do] not constitute a taking." Appendix A-12 to Petition for Writ of Certiorari. The difficulty is that by

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[12] Even if TRPA's TDRs and the potential dollars recoverable by their sale are viewed as part of the Just Compensation equation, it is still difficult to conceive how TRPA will meet its burden to show that they are in fact "Just Compensation". As the Ninth Circuit cautioned in ***TSPC I*** in responding to TRPA's assertion that a property owner should first be required to "ripen" his or her case by seeking to pursue funds under one of the state buy-out programs, "it is not 'compensation' (Just or otherwise), either from TRPA or from either of the States . . . " ***TSPC I, supra,*** 911 F.2d. at 1341.

[13] For a most insightful discussion of the issue of "economically viable use" vs. focusing on "remaining market value", see the very recent decision of the Ninth Circuit in ***Del Monte Dunes at Monterey, Ltd. v. City of Monterey***, 95 F.3d 1422 (9th Cir., Sept. 13, 1996).

focusing its attention on this issue of potential ***recoupment of value***, the Ninth Circuit lost sight of the fact that the Fifth Amendment, as *Lucas* instructs, commands that the focus be on the ***uses precluded***. No post-takings remedy designed merely to provide the property owner with the speculative ability to later recoup some limited dollars should have any relevance to whether a "taking" has occurred in the first instance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decisions of the District Court and Ninth Circuit at issue are not only in direct conflict with the express holding of this Court in *Lucas* and other applicable case law, but threaten to undermine the essential Constitutional protections afforded by the Fifth Amendment to the Petitioner, as so carefully articulated and we thought settled in *Lucas*. Accordingly, Amicus Curiae joins with the Petitioner in respectfully urging this Court to reverse the holding of the Court of Appeals below, and to issue its opinion and order directing the District Court on remand to proceed with dispatch with the trial on the merits of Mrs. Suitum's case to determine the amount of Just Compensation to which she so clearly entitled.

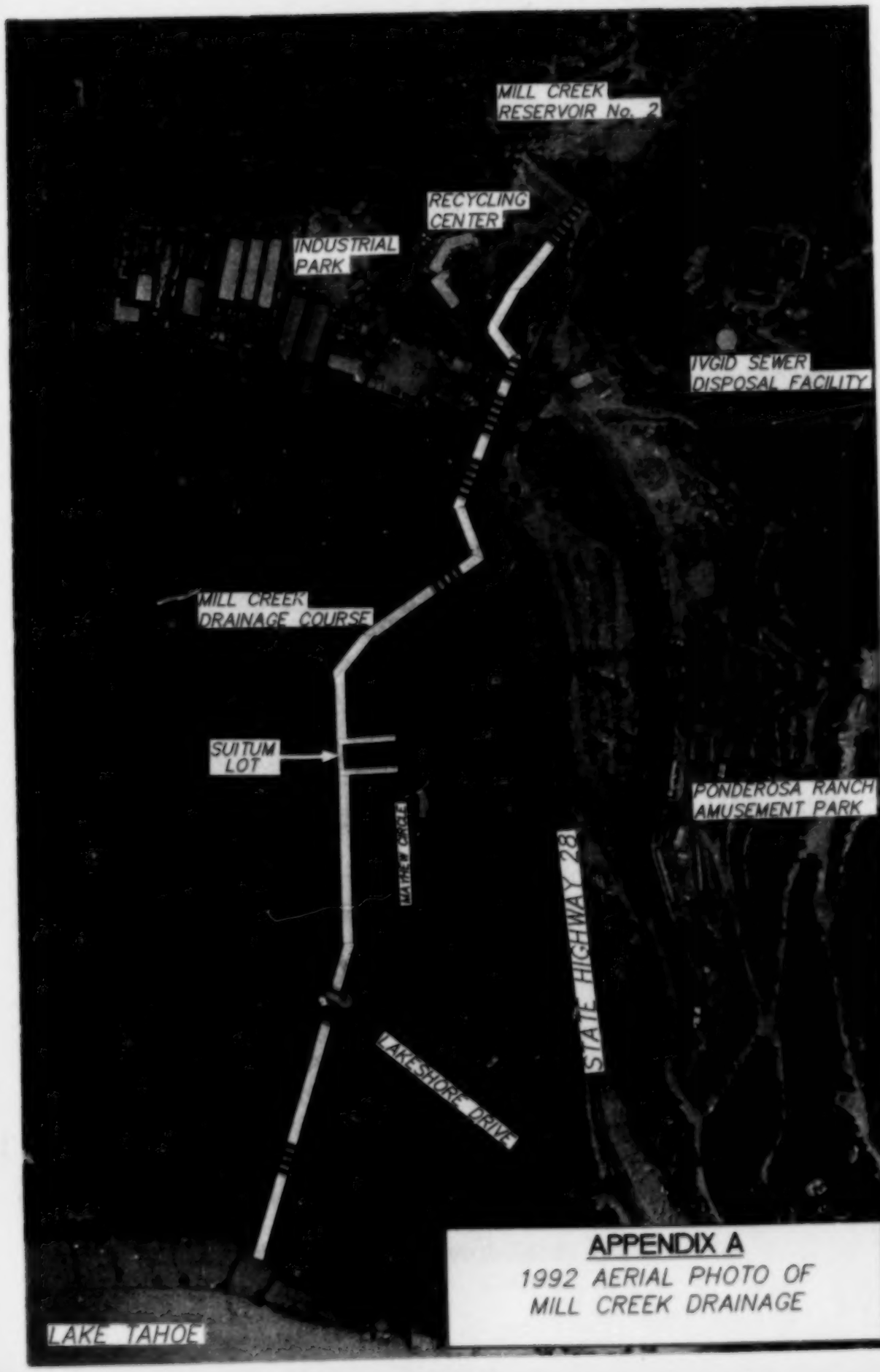
DATED: November 27, 1996.

Respectfully submitted,

LAWRENCE L. HOFFMAN
COUNSEL OF RECORD

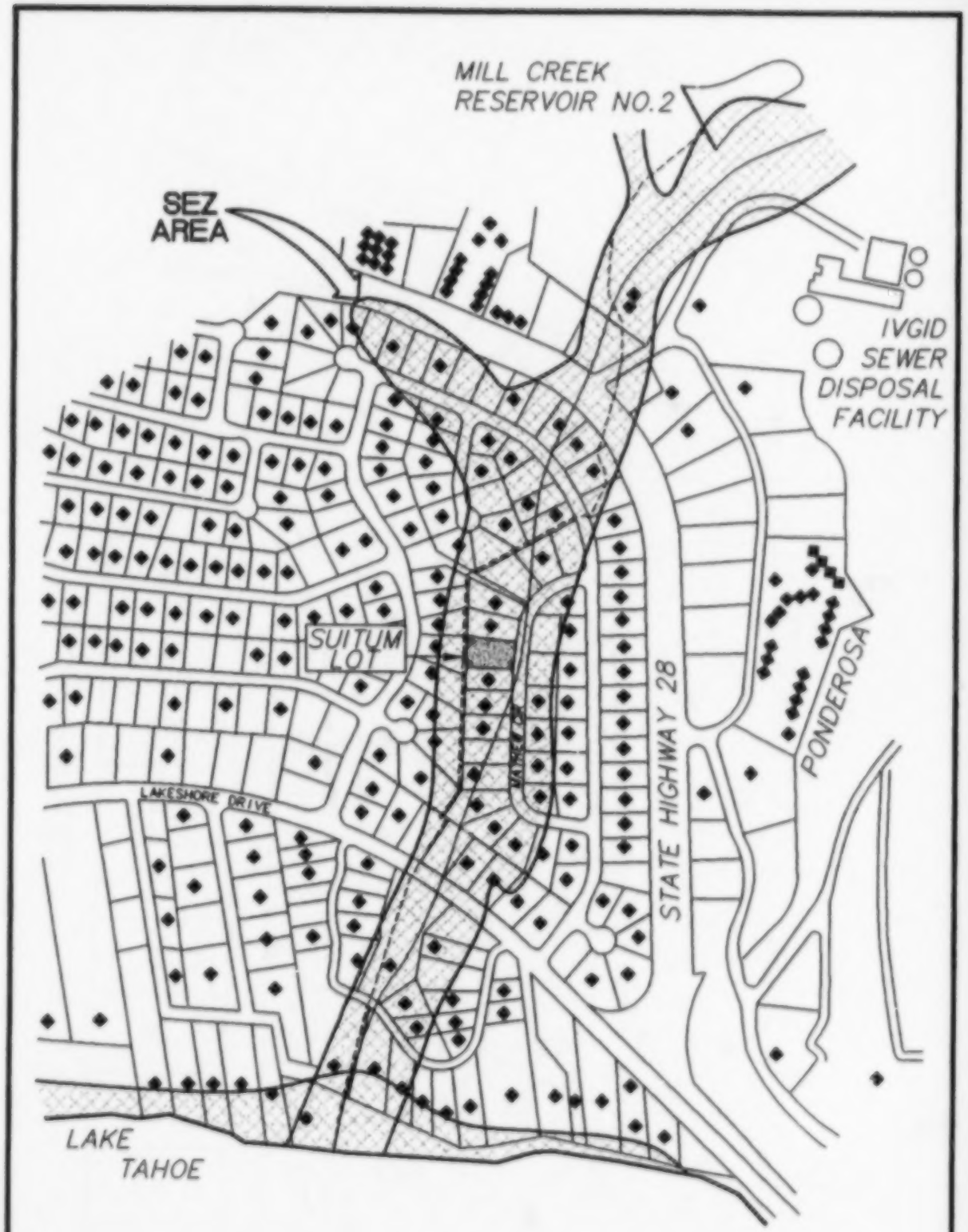
ATTORNEYS FOR AMICUS CURIAE
TAHOE-SIERRA PRESERVATION
COUNCIL, INC.

APPENDICES



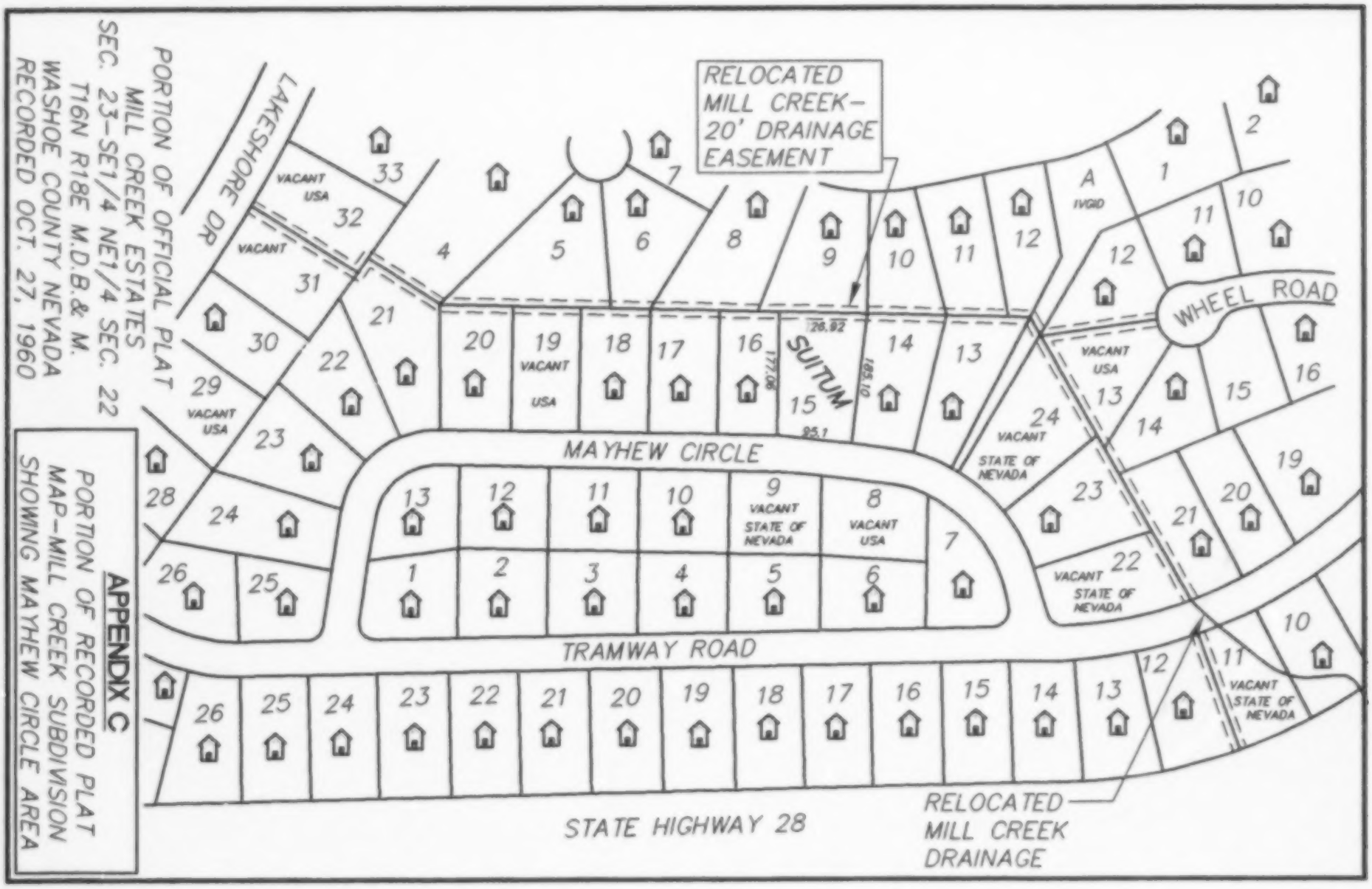
APPENDIX A

1992 AERIAL PHOTO OF
MILL CREEK DRAINAGE



APPENDIX B

TRPA MAPPED SEZ-
MILL CREEK DRAINAGE
SHOWING EXISTING RESIDENCES


PORTION OF OFFICIAL PLAT
MILL CREEK ESTATES
SEC. 23-SE1/4 NE1/4 SEC. 22
T16N R18E M.D.B.& M.
WASHOE COUNTY NEVADA
RECORDED OCT. 27, 1960
APPENDIX C
PORTION OF RECORDED PLAT
MAP-MILL CREEK SUBDIVISION
SHOWING MAYHEW CIRCLE AREA
LAKESHORE DR
RELOCATED MILL CREEK-20' DRAINAGE EASEMENT
WHEEL ROAD
MAYHEW CIRCLE
TRAMWAY ROAD
STATE HIGHWAY 28
RELOCATED MILL CREEK DRAINAGE
SUITUM
VACANT USA
VACANT STATE OF NEVADA
IVGID